Due service of the within Brief is hereby acknowledged this.....day of September, A. D. 1938.

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Counsel for Respondents.

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SUPREME COURT
OF THE
UNITED STATES.

October Term, 1938

No. 21

WM. H. NEBLETT, *et al.*,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., *et al.*,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF.

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PETITIONERS' SUPPLEMENTAL BRIEF.

On April 2, 1938, petitioners filed their petition and brief, praying for a writ of certiorari to review a decision of the Supreme Court of California,[1] affirming a judgment of the Superior Court[2] of Los Angeles County, which had approved a reorganization, by the Insurance Commissioner, of The Pacific Mutual Life Insurance Company of California.

Two groups of respondents filed briefs, opposing the granting of the writ. The writ was granted May 16, 1938.[3]

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[1]*Carpenter v. Pacific Mutual,* 10 Cal. (2d) 307.

[2]The Superior Court is the court of original jurisdiction in California.

[3]*Neblett v. Carpenter,* 82 L. Ed. Adv. Op. 1037.

The writ of certiorari was sought upon the grounds that due process, under the 14th Amendment to the Federal Constitution, had been denied petitioners and all other policyholders of the company in its reorganization, and that their contracts of insurance had been impaired in violation of Art. 1, Sec. 10, of the Federal Constitution.

This supplemental brief is filed for the purpose of expanding the points, made in the brief, supporting the petition for the writ, and with the desire of meeting the arguments in respondents' briefs, opposing the granting of certiorari.

ARGUMENT.

Summary of Argument.

Due Process May Be Denied and Contracts Impaired By Any One or All Three Branches of a State Government—the Legislative, the Executive or Administrative, and the Judicial.

POINT I.

All the questions presented in the petition for writ of certiorari and its supporting brief are Federal.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673; *Fairmont Creamery Company v. Minn.*, 274 U. S. 1.

POINT II.

The procedure prescribed by the California Legislature in § 1011 of the Insurance Code, for the forfeiture of title to the Insurance Commissioner of the properties of

an insurer, violates the due process clause of the Federal Constitution and impairs the contracts of policyholders in a company taken over by the Commissioner. It is an unconstitutional delegation of legislative power to an administrative officer.

California Insurance Code, Secs. 1011 and 16; *Panama Pacific Refining Co. v. Ryan,* 293 U. S. 388; *Schechter v. U. S.,* 295 U. S. 495; *Home Building & Loan Assn. v. Blaisdell,* 290 U. S. 398.

POINT III.

It is a violation of the due process and contract clauses of the Federal Constitution to delegate to a commissioner of insurance, or to any other state administrative officer, the right to take evidence and make findings determining the forfeiture of title in property without notice and hearing. If, under the Constitution, the power could be delegated to the commissioner, he would have to make the determination to forfeit himself, after consideration of the evidence. He could not delegate that power to any other person or persons.

California Insurance Code, Secs. 1011 and 7; *Morgan v. United States* (first appeal) 298 U. S. 468; (2nd appeal) 82 L. Ed. Adv. Op. 757; (on rehearing) 82 L. Ed. Adv. Op. 1030; *East Tenn. etc. Railroad Co. v. So. Telephone Co.,* 112 U. S. 306; *Murray v. American Surety Co. of N. Y.* (C. C. A. 9) 70 Fed. 341; *Smith v. Westerfield,* 88 Cal. 374.

POINT IV.

The Superior Court of California never acquired jurisdiction of the subject matter, the Pacific Mutual Life Insurance Company of California, or of its policyholders. It is always a denial of due process for a court to proceed without jurisdiction and make orders affecting property rights.

Pennoyer v. Neff, 95 U. S. 714; *Scott v. McNeal*, 154 U. S. 34; *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673; *Garris v. Mitchell*, 7 Cal. App. (2d) 430; *Richardson v. Superior Court*, 138 Cal. App. 389; *French Bank Case*, 53 Cal. 495; *Elliott v. Superior Court*, 168 Cal. 727; *Fischer v. Superior Court*, 110 Cal. 129; *Lindsay-Strathmore Irrigation Dist. v. Superior Court*, 182 Cal. 315; *Marin M. W. Dist. v. North Coast Water Co.*, 178 Cal. 324; *Thompson v. Consolidated Gas Utilities Corp*, 300 U. S. 55; *Panhandle E. Pipe Line Co. v. State Highway Comm.*, 294 U. S. 613; *Gilfillan v. Union Canal Co.*, 109 U. S. 401; *Canada So. Railroad Co. v. Gebhard*, 109 U. S. 527; *Doty v. Love*, 295 U. S. 64.

POINT I.

All the Questions Presented in the Petition for Writ of Certiorari and Its Supporting Brief Are Federal.

This Court holds that the due process required by the 14th Amendment to the Federal Constitution may be denied by any one or more of the three departments of a state government.

> "The Federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."
>
> *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673, 679.

The respondents urge that the construction of the California Insurance Code and the powers and duties of the Insurance Commissioner in administering that Code, are purely state questions. The argument ignores the principle that a state court, in exercising the right of construing a state statute, must heed the requirement of due process, guaranteed to all citizens by the 14th Amendment to the Federal Constitution.

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the Laclede Land

& Improv. Co. case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 681.

A Federal question is presented when a state statute interferes with the freedom of contract.

"But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the 14th Amendment, and to declare it invalid when without substantial relation to some evil within the power of the State to suppress and a clear infringement of private rights."

Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 12.

POINT II.

The Procedure Prescribed by the California Legislature in § 1011 of the Insurance Code, for the Forfeiture of Title to the Insurance Commissioner of the Properties of an Insurer, Violates the Due Process Clause of the Federal Constitution and Impairs the Contracts of Policyholders in a Company Taken Over by the Commissioner. It Is an Unconstitutional Delegation of Legislative Power to an Administrative Officer.

All that the California Legislature requires the Commissioner to do in order to take away title to the properties of an insurance company, under § 1011 of the Insurance Code, is to file an application in the Superior Court of the county where the insurance company has its main office, showing any one of the ten acts, or conditions, enumerated in that section, to have been committed by the company, or to exist.

When the Insurance Commissioner files such an application, the Insurance Code deprives the Superior Court of all discretion. The court[4] is commanded to appoint the Commissioner, conservator of the insurer and to vest title to all of its assets and properties in him, without notice or hearing of any sort. The Commissioner, in his sworn Application in this action, alleged the existence of two of the ten conditions set up in the Code. They were that, the Commissioner had found and there was shown to exist after a report of an examination made, that the Pacific

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[4]Cal. Ins. Code, §§ 16, 1011.

Mutual Life Insurance Company of California was in a hazardous and insolvent condition.[5]

The court, immediately upon the filing of the application, observed the command of §§ 1011 and 16 of the Insurance Code, which say that: "The court *shall* issue its order vesting title to all of the assets of the insurer in the Commissioner as conservator." The word *"shall"*, whenever used in the Insurance Code, is by § 16 of the Code, made "mandatory.".[6]

The procedure prescribed by § 1011 violates all of the tenets of due process. The findings of fact upon which the order of the court *must* be made forfeiting the title in the assets of the insurer to the Insurance Commissioner are made, not only in advance of the filing of the complaint, or application before the court, but are made by the Insurance Commissioner, an administrative officer of the state, *ex parte,* and without notice.

There is no intimation in the Insurance Code of the existence of an emergency necessitating the release or delegation of the powers of the Legislature, over the business of insurance, to the Commissioner. The state courts also failed to find that any emergency existed. There was no occasion for the legislative action, such as the emergency which existed, and upon which the decision of this court, in *Home Building and Loan Association v. Blaisdell,* 290 U. S. 398, is based. In that case none of the ultimate

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[5]R. 1.

[6]Cal. Ins. Code, *infra,* p. 28.

benefits in the contracts were impaired. This court there held that, on account of an existing economic emergency, the Minnesota Legislature had made a constitutional grant of a moratorium on the foreclosure of mortgages. The Minnesota Legislature established a definite procedure which had to be taken, protecting the rights of both the mortgagor in redemption and the mortgagee in foreclosure, by declaring a moratorium against mortgage foreclosure for a prescribed period. No change was made in the ultimate promises to pay.

The release by the California Legislature to the Insurance Commissioner of the power to take evidence *ex parte* and to find the facts, upon which the court must forfeit the title of an insurer to its properties, and also to impair the contracts of the policyholders of the company, without a hearing, was an unwarranted delegation of the legislative functions to an administrative office, like that attempted to be done by the Congress to the President in the National Recovery Act, held by this court to be an unconstitutional delegation of legislative power to an executive officer. (*Panama Pacific Refining Co. v. Ryan,* 293 U. S. 388; *Schechter v. United States,* 295 U. S. 495.)

POINT III.

It Is a Violation of the Due Process and Contract Clauses of the Federal Constitution to Delegate to a Commissioner of Insurance, or to Any Other State Administrative Officer, the Right to Take Evidence and Make Findings Determining the Forfeiture of Title in Property Without Notice and Hearings. If, Under the Constitution, the Power Could Be Delegated to the Commissioner, He Would Have to Make the Determination to Forfeit Himself, After Consideration of the Evidence. He Could Not Delegate That Power to Any Other Person or Persons.

In his petition or application, under § 1011 of the California Insurance Code, upon which the whole proceeding rests, Carpenter set out that he was the Insurance Commissioner of the State of California "and for cause of action against respondent (old company) alleges, etc."[6]

After alleging his capacity to sue, the Commissioner, in paragraph IV of his application, stated his reasons or findings of fact for the action he was taking.[7]

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[6]R. 1.

[7]R. 3, paragraph IV:

"That petitioner together with a number of other insurance commissioners of states in which respondent corporation transacts its business have made a convention examination of the business and affairs of respondent corporation as of December 31, 1935, and in connection therewith petitioner and said other commissioners have joined in a report of such ex-

This court, in *Morgan v. United States* (1st, appeal) 298 U. S. 468; (2nd appeal) 82 L. Ed. Adv. Op. 757; (on rehearing) 82 L. Ed. Adv. Op. 1030, has held that, where the statutory duty is placed upon an administrative officer to determine, as a quasi-judicial officer, facts under a statute, the administrative officer, upon whom the duty is imposed, must do the determining himself. If he fails to perform his duty, recitals made by him, attempting to show the correctness of the action taken, are not binding.

> "But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion."
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> *Morgan v. United States*, 298 U. S. 468, 477.

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amination, a certified copy of which is attached hereto, marked Exhibit 'A' and made a part hereof.

"That said examination and report shows that respondent corporation is in such condition that its further transaction of business will be hazardous to its policy holders, its creditors and to the public; that said examination and report further show that respondent corporation is insolvent within the meaning of article 13, chapter 1, part 2, division 1, of the Insurance Code of the State of California; that respondent corporation's said hazardous and insolvent condition is principally caused, among other things, by reason of the fact that respondent corporation has for a considerable number of years last past issued a large number of non-cancellable accident and health policies at a premium rate which was and is now entirely inadequate to maintain the reserves required by law to mature said policy obligations."

The wholesomeness of the announced rule of this court, regulating quasi-judicial procedures by administrative officers, could be no better illustrated than by what the Insurance Commissioner did not do, in acquiring the title to the assets of the Pacific Mutual Life Insurance Company, upon his finding that the company was in a hazardous condition and insolvent.

The contention of the respondents that the procedure taken by the Insurance Commissioner is a state question, without bearing upon the Federal questions of due process and impairment of contract "is futile. It has regard to the mere form of the proceeding and ignores realities."[8]

The realities stand out in opposition to the claim that the procedure involved a state question only, when the terms of the law are considered. The sole power of determining the facts to sustain a forfeiture of title being in the Insurance Commissioner and not in the court, the latter becomes a mere ministerial agency for the approval, by order, of the facts already found and the conclusions reached by the Commissioner.

History will show that the *Morgan* cases came in time to prevent the frittering away of constitutional liberties through decisions in quasi-judicial actions, made by persons not authorized to hear and determine such questions.

> "It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer

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[8] *Morgan v. United States*, 82 L. Ed. Adv. Op. 757, 761.

> who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."
>
> *Morgan v. United States,* 298 U. S. 468, 481.

The California Insurance Code places squarely upon the shoulders of the Insurance Commissioner, the duty of considering the evidence, from which his final conclusion of hazardous condition and insolvency of the Pacific Mutual Life Insurance Company of California was made. The importance of the duty of the Commissioner, under the Insurance Code, is greatly amplified by the mandatory provisions of the Code compelling the court, upon the filing of an application by the Commissioner showing that he has, from an examination, found one or more of the required conditions for the forfeiture of title to exist, in order to vest title in the Commissioner of all of the properties of the insurer.

The Commissioner's sworn application alleges that he, together with a number of Insurance Commissioners of other states, had made a convention examination of the old company as of December 31, 1935, and compiled a report of such examination, which was attached as Exhibit "A" to the application. The Commissioner then alleged that the report showed the company to be in a hazardous and insolvent condition. The report upon which he based his findings shows that he never saw the evidence from which his conclusions were drawn. He made the same error, as that made in the *Morgan* case, of adopting the conclusions of someone else.

His sworn application shows that he took a report made for him by seven men, five of whom were from other states than California. The Insurance Code required the findings to be made by him. That duty was imposed upon him and upon no one else. He could not delegate it, as he did, even though § 7 of the Insurance Code provides that the duties and powers imposed upon the Commissioner by the Code may be performed by a deputy.[2]

The report of examination is a letter dated July 21, 1936, addressed to the California Insurance Commissioner and to those of six other states.[3] Two of the seven signers of the letter described themselves as "Principal Examiner—State of California" and "Actuary——State of California." There is nothing in the letter to show that those two were connected with the Insurance Department of the State of California, or that they were deputies of the Insurance Commissioner. Of the seven men who signed the report, five stated that they were from other states than California.[4] It must be assumed that, since seven persons compiled the report, their final figures and conclusions,

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[2] § 7 "*Deputies, power.* Whenever, by the provisions of this code, a power is granted to a public officer or a duty imposed upon such an officer, the power may be exercised or the duty performed by a deputy of the officer or by a person authorized pursuant to law by the officer, unless it is expressly otherwise provided."

[3] R. 12; see Appendix, *infra*, p. 27.

[4] R. 32; see Appendix, *infra*, p. 28.

which the Commissioner adopted, were the result of the advice and the vote of the majority.

There is no hypothesis from which it could be reasoned that the report upon which the whole proceeding hinged for its validity, was made by the Insurance Commissioner of California, or participated in by him. The report itself shows beyond all doubt that it was made by non-residents of California over whom no one in this state had any jurisdiction or control.[5]

In the light of the opinions in the *Morgan* case, the Commissioner destroyed all jurisdiction in himself and in the court and proceeded not only without due process, but with no process at all, when he swore that the report and findings upon which he took over the company and title to its properties were made by a board of seven members over whom he had no jurisdiction, the majority, or five of whom, were from other states.

Of course, the Legislature could not make a constitutional delegation of the powers it attempted to confer upon the Commissioner, but when he, in taking over the company, went far beyond the powers attempted to be conferred, his action was void without regard to the constitutionality of § 1011.

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[5]R. 32.

Whenever it appears from an administrative officer's own statement, as it does from the Insurance Commissioner's affidavit here, that he has let someone else's judgment be substituted for his own in the performance of his quasi-judicial duties, affecting property rights, the due process clause of the Federal Constitution has been violated.[6]

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authorities. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."
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> *Morgan v. U. S.*, 82 L. Ed. Adv. Op. 757, 762.

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[6]*Murray v. American Surety Co., New York* (C. C. A. 9) 70 Fed. 341; *Smith v. Westerfield,* 88 Cal. 374; *East Tennessee, etc. Railroad v. Southern Telephone Co.,* 112 U. S. 306.

POINT IV.

The Superior Court of California Never Acquired Jurisdiction of the Subject Matter, the Pacific Mutual Life Insurance Company of California, or of Its Policyholders. It Is Always a Denial of Due Process for a Court to Proceed Without Jurisdiction and Make Orders Affecting Property Rights.

On July 22nd, 1936, the Pacific Mutual Life Insurance Company of California was reorganized by the Commissioner and the reorganization approved by the Superior Court. All of the orders of the court made then, and between that time and August 11th, 1936, have been held void by the Supreme Court of California, on account of the disqualification of the Superior Judge who made the orders.[5]

The insurance company filed an appearance, at the same time that the Commissioner's application was filed,[6] consenting that the case be heard and determined immediately, and that the relief prayed for in the application of the Commissioner be granted. A conservator is a receiver.[7] If the appointment of the Commissioner as conservator and the vesting of title in him were not otherwise authorized,

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[5]R. 1526-1527.

[6]R. 33.

[7]*Garris v. Mitchell*, 7 Cal. App. (2d) 430; *Richardson*

and we have shown that they were not, the consent added nothing to the proceedings.[8]

The disqualification of a Judge is jurisdictional in California.[9] If a court is without jurisdiction because of the disqualification of a Judge, who sits in a case, or for any other statutory reason; or if jurisdiction has not been given by the constitution, or the law of the forum, the lack of jurisdiction cannot be cured by consent.[1]

The reorganization of the insurance company became an accomplished fact on the 22nd of July, 1936. Since that time, nothing has been done in the Superior Court but to approve the void orders, made on the 22nd of July, 1936. The Supreme Court of California held that all of the orders of the court, prior to August 11, 1936, when a qualified Judge was assigned to the case, were void,[2] but held that the orders made without jurisdiction of the court could be approved by subsequent valid orders. The jurisdiction which the Superior Court did not have is said to have been picked up and reclaimed by the order of Judge Willis on August 11th.

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[8]*French Bank* case, 53 Cal. 495; *Elliott v. Superior Court,* 168 Cal. 727; *Fischer v. Superior Court,* 110 Cal. 129.

[9]California Code of Civil Procedure, Sec. 170.

[1]*Lindsay Strathmore Irrigation Dist. v. Superior Court,* 182 Cal. 315; *McClaughry v. Deming.* 186 U. S. 49.

> "It is the universal rule that jurisdiction of the subject matter cannot be conferred upon a tribunal by consent, and it follows that the parties cannot make an effective waiver of lack of such jurisdiction."

Marin M. W. Dist. v. North Coast Water Co., 178 Cal. 324, 328.

On August 11th, the Commissioner appeared before the court and made an oral *ex parte* application for a new order, appointing him conservator and vesting in him title to the assets of the old company. The Superior Court then made an order, attempting to confirm the prior void orders and purporting to reappoint the Commissioner, conservator, and vest title of the company's assets in him.[3]

The court recites that it made the order on the application of July 22nd, 1936. That is the only application ever filed, and it is afflicted with the infirmities already pointed out.

The court made certain findings of fact in its order of August 11, attempting to cure the patent infirmities in the application. The Supreme Court of California has held on this subject of practice that the proceeding was special and that findings were not required.[4] The findings made by the court in that order but tend to accentuate the infirmities of the application. The statute says that the application must show certain things. If the application does not show those things, the court is without jurisdiction to cure them by making findings. All that the court can do, upon filing of an application by the Commissioner, under § 1011 of the Insurance Code, is to perform the ministerial duty of appointing the Commissioner, conservator, and vesting title in him, as the section commands the court to do.

The Supreme Court of California has held that the proceedings initiated July 22nd and culminating on December 4th, 1936 in the final order of the court, constitute a

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[3]R. 322-328.

[4]R. 1531.

single proceeding.[5] The final order or judgment of December 4th, 1936, approving the reorganization of the company, made the reorganization agreement effective as of July 22nd, 1936.[6] It further approved the reorganization already completed on that first day, and confirmed the transfer and conveyance of the assets of the old company executed on July 22nd, the only conveyance ever made.[7] The court thus depends for its jurisdiction upon the original application, the original conveyance of July 22nd, and the so-called contract of rehabilitation of the same date, because there are no others.

The Superior Court began without jurisdiction of either the subject matter or the policyholders. It has never acquired jurisdiction. For the court to proceed without jurisdiction was a denial of due process. Having begun without jurisdiction everything that the state courts have since done is immaterial.

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.
>
> The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject mat-

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[5]R. 1526.

[6]R. 1378.

[7]R. 1387-88.

> ter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.' *Pennoyer v. Neff*, 95 U. S. 714, 733."
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> *Scott v. McNeal*, 154 U. S. 34, 46.

In the *Scott* case this court held that the probate court denied due process in administering an estate of a man who was still alive. The decision is applicable here because that case was a proceeding in rem like the case now before this court.

The Superior Court never acquired jurisdiction of the *res* here because the application of the Commissioner was insufficient to confer jurisdiction upon the court. It never acquired jurisdiction of the policyholders because it forfeited their title without notice. (*Pennoyer v. Neff*, 95 U. S. 714, 733.)

The Supreme Court of California cites *Doty v. Love*, 295 U. S. 64, to support its holding that the reorganization of the Pacific Mutual Life Insurance Company, by dividing the policyholders into classes and treating them differently, is not an impairment of their contracts, because such treatment is authorized by implication in the Insurance Code.

It may be stated as an unqualified principle of constitutional law that creditors or others directly interested in a corporation's assets, cannot be classified, unless there is a statute permitting it, or unless their contracts authorize it.[1]

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[1] *Gilfillan v. Union Canal Co.*, 109 U. S. 401; *Canada Southern Railroad v. Gebhard*, 109 U. S. 527.

In *Doty v. Love,* the creditors of an insolvent bank were classified by the Superintendent of Banks of the State of Mississippi, and the bank reopened in pursuance of a statute providing that the Superintendent of banks, with the consent of the court, could reopen the bank, in accordance with a plan proposed by the vote of three-fourths of the creditors. That statute is not unlike section 77B of the National Bankruptcy Act, and it specifically provided for method used in the reorganization effected.

There was no authorization whatever in the California Insurance Code for the reorganization or rehabilitation of the Pacific Mutual Life Insurance Company, by the Insurance Commissioner, except that vague, uncertain and indefinite provision of § 1043 of the Insurance Code, permitting the Insurance Commissioner as conservator or liquidator, "to enter into rehabilitation agreements," after he had taken over the title to all of the assets of the company which he proposed to rehabilitate. Of course, once it is admitted that title may be taken, without due process, what follows after that doesn't matter.

The Supreme Court of California held that it was not an impairment of the obligation of contract, or a denial of due process, for the Commissioner to change all the contracts of the policyholders, classifying them and treating the classes differently, because that court held that the Commissioner was acting for the state under its police powers. The rule stated is erroneous and violates the due process clause for two reasons. It takes a common fund belonging to all creditors without statutory authority, and treats those differently who are entitled to share equally in assets, in accordance with the terms of their contracts. The decision justifies the use of one person's property for the benefit of another, which may not be done.

"And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."

Thompson v. Consolidated Gas Utilties Corp., 300 U. S. 55, 80.

"A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions."

Panhandle Pipe Line Co. v. State Highway Comm., 294 U. S. 613, 619.

In the light of this principle, the state, acting through its Insurance Commissioner, was in no better position to impair the contracts of the policyholders, or to deny them due process of law, than would have been the company itself.

Lastly, the Supreme Court of California erred when it held that policyholders who refused to assent to the plan could file their claims with a non-existent liquidator.[2] The Insurance Code makes no provision for liquidation, or for the filing of claims until a liquidator is appointed. None has ever been appointed. That the Commissioner might be appointed liquidator at some future time, if it should appear to him that his efforts as conservator were futile, is immaterial. (Cal. Ins. Code, § 1016). Constitutional rights are guaranteed; they can not be made to depend upon the contingency of the Commissioner's discretion as to the futility of his own acts.

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[2]R. 1520.

The only conveyance of title ever made of the assets of the old company to the new, was made by Carpenter, as *liquidator*, on July 22, 1936.[3] Upon that conveyance hinges the whole reorganization, rehabilitation, or by whatever name the method used by the Insurance Commissioner, in getting the title of the assets of the old company out of it and into the new, may be called. The Insurance Commissioner was not at the time either conservator or liquidator. The orders appointing him, first, as conservator, and again, as liquidator, were void,[4] because, among other things, the Judge who sat was disqualified, and had no jurisdiction to make them. Whenever a court acts without jurisdiction, it denies due process. *(Scott v. McNeal,* 154 U. S. 34.)

The fact that the court held that the plan of rehabilitation contemplated the appointment of a liquidator is of no importance. Within the time allowed by law, this appeal was taken, depriving the Superior Court of jurisdiction to appoint a liquidator or to take any other action in the case.[5]

There was no occasion for the appointment of a liquidator. There was nothing left in the old company for him to liquidate.

It is true that the Commissioner held as trustee for the old company the stock of the new and some nebulous

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[3]R. 183-190.

[4]R. 1526-1527.

[5]*Eisenberg v. Sup. Ct.,* 193 Cal. 575; *Durbrow v. Chesley,* 23 Cal. App. 627.

claims of rights of action against officers of the old company of highly speculative and contingent value. It is to be assumed that the Commissioner paid full value for the stock of the new company, $3,000,000, which he generously took from the cash of the old company. The probable liabilities on the policies of the old company were $700,000,000, against which the value of the capital stock of the new company, $3,000,000, would be an unimportant item. If all the policyholders dissented, $3,000,000 would satisfy less than one-half of one per cent of their claims. However, the situation is worse than this calculation makes it appear, because the rehabilitation agreement provided for the ultimate mutualization of the new company, rendering its stock worthless.[6]

CONCLUSION:

In conclusion, we claim that the public importance of this case cannot be over-estimated, because upon its decision depends the sanctity of all contracts of life, accident and health insurance in the United States, contracts in which the great majority of the people of all of the states are interested.

Life insurance is alone by far the largest of all financial businesses in the United States. The Pacific Mutual Life Insurance Company of California, 16th in size in the United States, a comparatively small company, had 300,000 policyholders, $215,000,000 in assets, and $700,000,000 in

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[6]R. 1428.

outstanding insurance contracts. The sanctity of all contracts of insurance is involved in this proceeding. Sixty-five million life policyholders throughout the United States, who pay $6,000,000,000 a year in premiums, and who have built up $26,000,000,000 in reserves behind their $110,000,000,000 in life insurance contracts, depend for the protection of those contracts upon the decision to be made here. We pray for a reversal of the judgment.

Respectfully submitted,

WM. H. NEBLETT,

R. DEAN WARNER,

Of Los Angeles,

Attorneys for the Petitioners.

ALFRED F. MACDONALD,

ALLAN H. MCCURDY,

VERNON BETTIN,

Of Los Angeles,

Of Counsel for Petitioners.

APPENDIX.

"Los Angeles, California
July 21, 1936.

Hon. Jess G. Read
Chairman, Committee on Examinations
National Association of Insurance Commissioners
Oklahoma City, Oklahoma

Hon. Samuel L. Carpenter, Jr.
Insurance Commissioner
San Francisco, California

Hon. E. A. Conway
Secretary of State
Baton Rouge, Louisiana

Hon. Robert L. Bowen
Superintendent of Insurance
Columbus, Ohio

Hon. R. L. Daniel
Chairman, Board of Insurance Commissioners
Austin, Texas

Hon. George A. Bowles
Superintendent of Insurance
Richmond, Virginia

Hon. William A. Sullivan
Insurance Commissioner
Olympia, Washington

Sirs:

Pursuant to your direction, the undersigned examiners have made an examination of the accounts and financial condition of THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA with home office at Los Angeles, California, and are showing herewith the financial statement compiled.

FINANCIAL STATEMENT ....."

R. 12.

"..... From a survey of the above figures it is apparent that immediate action must be taken to protect policyholders.

Respectfully submitted,

R. M. MEYER,
Principal Examiner—State of California;

CARL E. HERFURT,
Actuary—State of California;

THOMAS F. BIENVENN,
Examiner—State of Louisiana;

E. E. COLTRIN,
Examiner—State of Ohio;

HOMER SANDERFORD,
Examiner—State of Texas;

C. B. COULBOURN,
Actuary—State of Virginia;

F. E. HUSTON,
Actuary—State of Washington."

R. 32.

Insurance Code of California

§ 16. "As used in this code the word "shall" is mandatory and the word "may" is permissive, unless otherwise apparent from the context."